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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 501

H. S. GIBBS, COASTAL PROPERTIES, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND BRIEF IN SUP-
PORT OF PETITION.

R. E. WHITEHUBER,

New Bern, N. C.;

J. C. B. EHRINGHAUS,

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**PETITION FOR WRIT OF CERTIORARI TO THE
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*To the Honorable Harlan Fiske Stone, Chief Justice of the
United States, and the Associate Justices of the Supreme
Court of the United States:*

Your Petitioners respectfully show:

Summary of the Matter Involved

This is an action seeking both legal and equitable relief (Complaint R. 3). It was brought in the District Court by the Respondent herein, against the Petitioners herein, asking that the deed (Ex. B, R. 10) from the United States to Petitioner, H. S. Gibbs, dated May 18, 1943, and duly

recorded in the Public Registry of Onslow County, as well as subsequently executed deeds from said Gibbs to Petitioner, H. Emmett Powell (Ex. C, R. 15, dated June 7, 1943 and duly recorded) and from said Gibbs to Petitioner, Coastal Properties, Inc. (Ex. D, R. 16, dated June 7, 1943, and duly recorded) all covering an off-base area set apart for commercial facilities, be declared null and void and a cloud upon Respondent's title, that Petitioners be enjoined from asserting any right, title, interest or claim thereunder, and that Respondent be declared the "owner and solely entitled to the possession" of said lands. Such was the decree of the District Court.

The basis of Respondent's claims for relief was that the deed from the United States to Gibbs (Ex. B, R. 10), executed by the Commissioner of the Federal Public Housing Authority, was made subsequent to the date of a letter (Ex. A, R. 9) dated July 16, 1942, transferring (effective August 1, 1942) "to the jurisdiction of the Navy Department", Defense Housing Project No. N. C. 31032 known as New River Defense Housing, Jacksonville, North Carolina, made purportedly under the "provisions of Sec. 4 of Public Law 409, 77th Congress, 2nd Session," amending the Lanham Act (42 U. S. C. A., Sec. 1521 et seq.) under which the area conveyed (and much more) was originally condemned by the United States. Reference was also made by said letter to Ex. Order 9070 of February 24, 1942 (50 U. S. C. A. App. 206).

The letter of transfer was not recorded in the Federal Registry or elsewhere.

There was motion by Respondent (R. 24) for summary judgment under Rule 56 upon the ground that "no genuine issue as to any material fact has been raised by the pleadings."

There was like motion by Petitioners (R. 26) and reference to their answer (R. 21) raising the question of juris-

diction in the District Court (a) because of the provision of 42 U. S. C. A. Sec. 1522 requiring actions "for the recovery of possession" to be brought in the State Courts and making the laws of the States applicable and (b) because the Complaint "states no cause of action for relief which can be granted in this cause."

The District Court declined Petitioners' motion and granted Respondent's motion and adjudged accordingly, including an adjudication (R. 38) that the United States "is the owner and solely entitled to the possession" of the disputed area. This judgment was approved by the Circuit Court of Appeals.

The area in controversy had, in the condemnation, been set apart for "commercial facilities" and deed to Respondent was made for these purposes only (R. 10).

The date of the judgment of the Circuit Court here sought to be reviewed is July 13, 1945.

The opinion of the Circuit Court of Appeals was dated July 13, 1945, and is reported in 150 F. 2d 504.

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because of the provision of 28 U. S. C., Sec. 347 (a).

The case involves,

(1) The validity of the Government's suggestion that the unrecorded letter (Ex. A, R. 9) transferring "the whole of Defense Project No. N. C. 31032 known as New River Defense Housing" to the jurisdiction of the Navy Department, supersedes and invalidates the provisions of Ex. Order 9150 (50 U. S. C. A., App. page 256) made pursuant to 50 U. S. C. A. App. Sec. 632 and duly recorded in the Federal Register and invalidates also deeds made pursuant

thereto and in accord with the oft-declared Congressional policy that commercial facilities should be developed by private enterprise, a policy reiterated in the very first sentence of the very statute from which authority for the transfer is allegedly derived.

(2) The propriety of the Summary Judgment for Respondent in view of

(a) the fact that the sale to Petitioner Gibbs was initiated by the Marine Commandant (a service branch of the Navy) and carried through—all presumably with the knowledge, consent and approval of the Navy Department,

(b) the transfer to the Navy was never recorded in the Federal Registry,

c) the attack upon Respondents deed was (so far as this commercial area is concerned) in direct violation of a conveyance made pursuant to the Congressionally declared policy, and

(d) the provisions of Ex. Order 9150 still subsist as controlling transfers of title and there is no other branch of the Government authorized to make a deed and certainly there is no authority to make a deed conferred on the Navy Department.

(3) The jurisdiction of the District Court in view of the provisions of 42 U. S. C. A. Sec. 1522 requiring actions for the recovery of possession of area condemned under the Lanham Act to be brought in the State Courts and making the laws of the States applicable thereto.

Reasons Relied On for Allowance of the Writ

The decision here challenged decides three important questions of Federal law which have not been but, in the

public interest, should be settled by the Supreme Court, since many titles are or may be involved.

Miles v. Illinois Central RR. Co., 315 U. S. 698 (86 L. Ed. 1129, 62 Sup. Ct. 827);

L. Ed. 1129) (62 Sup. Ct. 827), Rehearing denied 316 U. S. 708 (62 Sup. Ct. 1037.);

Worcester Co. Trust Co. v. Riley, 302 U. S. 292 (82 L. Ed. 268, 58 Sup. Ct. 185);

O'Donnell v. Great Lakes Dredge & Dock Co., 318 U. S. 36.

The questions presented may be summarized thus:

(a) Where lies the authority to execute deeds in behalf of the United States for areas condemned under the Lanham Act and dedicated to Commercial uses?

(b) Does a transfer of jurisdiction by letter unrecorded in the Federal Registry, supersede Executive Order 9150 and authorize such deeds by the Navy Department or does the power to make a deed for such areas remain still, under Executive Order 9150, in the Federal Public Housing Authority through its Commissioner? All deeds for such areas must accord with the decision of the Supreme Court on these questions and the validity of many deeds and enterprises initiated pursuant thereto will be controlled thereby.

(c) Do the States or the Federal District Courts have jurisdiction in such controversies?

WHEREFORE, your Petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Fourth Circuit

had in the case number and entitled on its docket, No. 5371, H. S. Gibbs and wife, Lucille L. Gibbs, H. Emmett Powell and wife, Mildred Fleming Powell, and Coastal Properties, Inc., Appellants, vs. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statute of the United States; and that the judgment herein of said United States Circuit Court of Appeals, Fourth Circuit, be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this 11th day of October, 1945.

R. E. WHITEHURST,

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J. C. B. EHRINGHAUS,

Raleigh, N. C.;

Counsel for Petitioners.

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Opinion of Court Below

The opinion in the Circuit Court of Appeals, Fourth Circuit (R. p. 42) was delivered July 13, 1945, and is reported in 150 F. (2d), 504.

Jurisdiction

1. The date of decision to be reviewed was July 13, 1945.
2. The Statutory provision which is believed to sustain the jurisdiction of this Court is 28 U. S. C., Sec. 347 (a).
3. As will appear by reference to the Complaint (R. 25) the Respondent attacks the validity of a deed, and subsequent conveyances, made in behalf of the United States by the Federal Public Housing Authority through the Federal Public Housing Commissioner under the authority of Executive Order 9150 (50 U. S. C. A. App. page 256) issued April 28, 1942, recorded 7 F. R. 3217, all by virtue of and

pursuant to the authority vested in the President by Title II of the Second War Powers Act 1942, approved March 27, 1942 (Public Law 507, 77th Congress). See U. S. C. A. 50 App. Sec. 632.

The Respondent contends that the authority to make such deed was invalidated by a letter dated July 16, 1942, from the Administrator of National Housing Agency to the Secretary of Navy (Ex. A, R. 9) written pursuant to Sec. 4 Public Law 409, 77th Congress, Second Session and (Title 42 U. S. C. A., Sec. 1524) by virtue of Executive Order 9070 of February 24, 1942 (50 U. S. C. A. App. page 206), but not recorded in Federal Register. (See 50 U. S. C. A. App. Sec. 601, page 203 and also Federal Register Act of 1935, Sections 301 to 310 and 311 to 314. See Title II, 44 U. S. C. A., Supplement p. 29 et seq.)

4. Cases believed to sustain the said jurisdiction are as follows:

Miles v. Ill. Central RR. Co., 315 U. S. 698;
Worcester Co. Trust Co. v. Riley, 302 U. S. 292;
O'Donnell v. Great Lakes Dredge and Dock Co., 318 U. S. 36.

Statement of the Case

The case has already been stated in the preceeding Petition for Writ of Certiorari (page 1) and the statement thus made is hereby adopted and made a part of this brief.

Specifications of Errors

A. The Court erred in holding that the unregistered letter (Ex. A, R. 9) abrogated the provisions of Executive Order 9150 which was issued under 50 U. S. C. A. App. Section 601 and that deed made to Petitioners thereunder was invalid.

B. The Court erred in granting Respondents motion for Summary judgment.

C. The Court erred in sustaining the jurisdiction of the District Court.

ARGUMENT

Summary of the Argument

POINT A

At the threshold it would seem proper to quote in full Executive Order 9150 (50 U. S. C. A. App. 256) under and in accord with which the deed in controversy was executed. It follows:

"By virtue of and pursuant to the authority vested in me by Title II of the Second War Powers Act, 1942, approved March 27, 1942 (Public Law, 507, 77th Congress), (50 App. Sec. 632) the Federal Public Housing Commissioner of the National Housing Agency, or any officer of the Federal Public Housing Authority acting in the absence or disability of the Commissioner, is hereby authorized to exercise the authority contained in the said Title II of the Second War Powers Act, 1942 (50 App. Sec. 632), to acquire, use, and dispose of any real property, temporary use thereof, or other interest therein, together with any personal property located thereon, or used therewith, that shall be deemed necessary for war purposes; Provided, however, that the provisions of this order shall be applicable only to property in connection with defense housing and temporary shelter."

In brief summary on this point it may be further observed:

1. The letter (Ex. A, R. 9) was written ostensibly under the authority of 42 U. S. C. A. App. Sec. 1524. This section in full follows:

"It is hereby declared to be the policy of this sub-chapter to further the national defense by providing

housing in those areas where it cannot otherwise be provided by private enterprise when needed, and that such housing may be sold and disposed of as expeditiously as possible: Provided, That in disposing of said housing consideration shall be given to its full market value and said housing or any part thereof shall not, unless specifically authorized by Congress, be conveyed to any public or private agency organized for slum clearance or to provide subsidized housing for persons of low income: Provided further, That the Administrator may, in his discretion, upon the request of the Secretaries of War or Navy transfer to the jurisdiction of the War or Navy Departments such housing constructed under the provisions of subchapters II-IV of this chapter as may be considered to be permanently useful to the Army or Navy. Oct. 14, 1940, c. 862, Title I, sec. 4, as added Jan. 21, 1942, c. 14, Sec. 4, 56 Stat. 12."

2. The above quoted Section authorizes the "transfer of jurisdiction" but makes no pretense at providing power in the Navy to sell, deed or otherwise dispose of when the advisability to sell is properly decided or where, in keeping with public policy of developing by private (or other than Government) funds, a sale is required. There is no interference with the power of disposition and sale expressly conferred by Executive Order 9150, issued pursuant to 50 U. S. C. A. App. Sec. 601, and that such disposition under 9150 is contemplated is manifested by the first sentence in said section above quoted and underscored by us.

3. Insofar as the letter may appear to authorize such a disposition of the area (dedicated admittedly to commercial facilities) it would violate the policy declared by Congress in the first sentence of the very section (1524) pointed to as the basis of such authorization, which policy, so declared in the same section, operates by necessary implication as a limitation upon any power of conveyance therein authorized.

4. The letter does not necessarily conflict with the provisions of Executive Order 9150 issued under Section 601 and leaves the Federal Public Housing Authority (through the Public Housing Commissioner) as still the only Government agency with authority to convey title to this area in a proper case.

5. The Navy *still* has no statutory authority to make a deed. Wherever it is desired to so do (and the Lanham Act contemplates return of all areas so condemned to private ownership "as expeditiously as possible" (sec. 1524)) it still must call in the Housing Commissioner to make the deed. He is still the only one authorized to make a deed for this area.

6. The Public Register Act of 1935 laws prevents the letter of transfer from having validity.

44 U. S. C. A., Sec. 301 et seq. (Supp. p. 29 et seq.);

50 U. S. C. A., App. Sec. 601, page 203.

POINT B

1. On the record in this case, the Navy, having no funds to provide these commercial facilities on this "off base" site or having none certainly at the time of transfer, if it is to have such facilities, must call upon private enterprise to provide them, and this it did by instituting, through the local commanding (marine) officer, the effort to enlist private enterprise which resulted in the sale here attacked (R. 29, 30, 31 and 32, Exhibits 1, 2 and 3). Indeed, so far as we can ascertain, even now the Navy has no such appropriation.

2. If such *request by the Navy*, resulting in the conveyance here attacked, is not admitted on the record *is is a fact which should be determined or negatived by jury finding before final judgment in favor of the Government is*

proper. It indicated a recession by the Navy, *pro tanto*, from its request for transfer of jurisdiction and a voluntary relinquishment thereof.

So, pending such determination, *summary judgment for Government certainly was not proper.*

POINT C

On this point it is sufficient to cite 42 U. S. C. A., Sec. 1522, proviso, reading as follows:

"That any proceedings for the recovery of possession of any property or project developed or constructed under this subchapter shall be brought by the Administrator in the courts of the States having jurisdiction of such causes and the laws of the States shall be applicable thereto."

Conclusion

For the above reasons, briefly and concisely stated, Petitioners respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

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